UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-73979

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION LOCAL 226, AND BARTENDERS UNION LOCAL 165,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ARCHON CORP.,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union Local 165 ("the Union") to review a Board decision and order dismissing an unfair

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This case is before the Court on the petition of the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union Local 165 ("the Union") to review a Board decision and order dismissing an unfair

labor practice complaint issued against Hacienda Hotel, Inc. Gaming Corp. d/b/a Hacienda Resort Hotel and Casino and Sahara Nevada Corp. d/b/a Sahara Hotel and Casino ("the Companies"). The Board's order, which issued on September 29, 2007, and is reported at 351 NLRB No. 32, is final with respect to all parties under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) ("the Act"). (ER 1-5.)[1]

The Board issued the Order after accepting the Court's remand, which instructed the Board to either "articulate a reasoned explanation for the rule it adopted [as the basis for dismissing the complaint in its initial decision], or adopt a different rule and present a reasoned explanation to support it." *Local Joint Executive Board of Las Vegas, Culinary Workers Local 226 v. NLRB*, 309 F.3d 578, 586 (9th Cir. 2002) ("*LJEB*"). Pursuant to the Court's instructions providing that it may "adopt a different rule," the Board declined to rely on the rule it articulated in its initial decision, and instead dismissed the complaint based on a new fact-specific rationale. (ER 1-2.)

The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the Act (29 U.S.C. §160(a)) which authorizes the Board to prevent unfair labor practices. The Court has jurisdiction

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[1] "ER" references are to the Excerpts of Record filed by the Union with its brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)) because the Union conducts business in Las Vegas, Nevada. The Union's petition for review, which was filed on October 10, 2007, is timely because the Act places no time limit on such filings. Archon Corporation, the successor to the Companies, has intervened on behalf of the Board.

STATEMENT OF THE ISSUE PRESENTED

The primary issue is whether the Board reasonably dismissed the complaint, which alleged that the Companies violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to check off union dues after the expiration of their collective-bargaining agreements ("CBAs" or "the Agreements") with the Union. In so doing, the Board relied on "the particular circumstances of this case, in which the dues-checkoff clauses in the parties' [CBAs] contained explicit language limiting the [Companies'] dues-checkoff obligation to the duration of the agreements." (ER 1.) Thus, the subsidiary issue is whether the Board reasonably found that, in agreeing to this specific durational language, the Union waived any right to continued dues checkoff after the CBAs expired.

STATEMENT OF THE CASE

A. The Board's Initial Decision and Order in *Hacienda I*

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Companies violated Section

8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally ceasing deductions for union membership dues from its employees' paychecks after the expiration of CBAs covering those employees. After a hearing, the administrative law judge issued a recommended decision and order dismissing the complaint. (ER 13-16.) The General Counsel and the Union filed exceptions to the judge's decision, and amici AFL-CIO and the Council on Labor Law Equality ("CLLE") filed briefs. On July 7, 2000, the Board (Chairman Truesdale and Members Hurtgen and Brame, Members Fox and Liebman dissenting) issued a decision and order affirming the judge's dismissal of the complaint, and finding that the Companies acted lawfully by unilaterally ceasing union dues-checkoff after the CBAs expired. (ER 6-12.) The Board's decision in *Hacienda I* relied on a rule to the effect that a dues-checkoff obligation expires with the agreement that created it in the absence of a contractual union-security clause. (ER 7-8.)

B. This Court's Decision in *LJEB* and the Board's Action on Remand in *Hacienda II*

On the Union's petition for review, this Court found that it could not discern the Board's rationale in *Hacienda I* for excluding dues checkoffs from the usual rule against unilateral changes in the absence of a union-security clause. *LJEB*, 309 F.3d at 580, 586. Accordingly, rather than reach the merits of that rule, the Court vacated the order in *Hacienda I* and remanded the case to the Board so that it could either

"articulate a reasoned explanation for the rule it adopted, or adopt a different rule and present a reasoned explanation to support it." *Id.*

The Board accepted the Court's remand and findings as the law of the case. (ER 1-2.) The General Counsel, the Companies, the Union, and amici AFL-CIO and CLLE, filed statements of position with the Board. On September 29, 2007, in *Hacienda II*, the Board reaffirmed its original decision to dismiss the complaint, but "d[id] not rely on the rule articulated in [its] original decision." (ER 2.) Instead, following the Court's instruction that it may "adopt a different rule," the Board relied on "the particular circumstances of this case, in which the dues-checkoff clauses in the parties' collective-bargaining agreements contained explicit language limiting the [Companies'] dues-checkoff obligation to the duration of the agreements." (ER 1-2.)

STATEMENT OF FACTS

The Board based its findings on the undisputed facts described below.

I. THE BOARD'S FINDINGS OF FACT

A. The Dues-Checkoff Clauses in the Parties' Agreements Explicitly Limited the Companies' Obligation To Deduct Union Dues to the Duration of the Agreements

The Companies, operators of hotels and gambling casinos, and the Union had separate but substantially identical CBAs, the most recent of which contained identical dues-checkoff provisions stating:

> The Check-off Agreement and system heretofore entered into and established by the Employer and the Union for the check-

> off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made part of this Agreement, shall be continued in effect for the term of this Agreement.

(ER 1; 58, 68.) "Exhibit 2," referenced in the checkoff provisions, further provided:

> Pursuant to the Union Security provision[[2]] of the Agreement . . . the Employer, during the term of the Agreement, agrees to deduct each month Union membership dues . . . from the pay of those employees who have authorized such deductions in writing as provided in this Check-off Agreement.[3]

(ER 1; 59, 69.)

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[2] As the Board noted (ER 1 n.3), union-security provisions requiring union membership as a condition of employment are prohibited in right-to-work states like Nevada, where the Companies are located. *See* Section 14(b) of the Act (29 U.S.C. § 164(b)). Accordingly, the Agreements provided that the union-security clauses contained therein would be ineffective unless the state law was changed to allow union security. (*Id.*)

[3] Exhibit 2 also included a "Payroll Deduction Authorization" form, which stated in relevant part that the employee signing it agreed that the authorization would remain in effect, automatically renew from year to year, and be irrevocable unless revoked in writing

> during a period of fifteen (15) days immediately succeeding any yearly period subsequent to the date of this authorization or subsequent to the date of termination of the applicable contract between [the Company] and the Union, whichever occurs sooner . . . .

(ER 6; 59, 69.)

B. Consistent with the Specific Durational Limits in the Agreements' Dues-Checkoff Clauses, the Companies Ceased Deducting Dues after the Agreements Expired

Both Agreements expired on May 31, 1994. The Companies abided by the Agreements' checkoff provisions until June 1995, when they ceased checking off dues after notifying the Union that they intended to do so. (ER 1.) The Companies redirected to the employees in the form of regular wages the money that had formerly been deducted from employees' pay and remitted to the Union. (ER 6.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Schaumber and Kirsanow; Members Liebman and Walsh dissenting) reaffirmed its initial decision to dismiss the complaint against the Companies. In so doing, however, the Board explicitly "d[id] not rely on the rule articulated in [*Hacienda I*]." (ER 2.) Rather, pursuant to this Court's instruction that it may "adopt a different rule," *LJEB*, 309 F.3d at 586, the Board relied on the "particular circumstances of this case, in which the dues-checkoff clauses in the parties' collective-bargaining agreements contained explicit language limiting the [Companies'] dues-checkoff obligation to the duration of the agreements." (ER 1-2; 58-59, 68-69.)

SUMMARY OF ARGUMENT

The Board reasonably dismissed the complaint allegation that the Companies violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to

check off union dues after the expiration of the parties' CBAs. The Board did so based on the undisputed facts here, where the dues-checkoff clauses in the CBAs themselves, as opposed to general durational language elsewhere, contained language that explicitly limited the dues-checkoff obligation to the CBAs' duration. The Board reasonably found that, in agreeing to this language, the Union waived any right to continued dues checkoff after the CBAs expired. It is settled that a union may waive its statutory right to bargain. Moreover, the Board's waiver finding here accords with precedent recognizing that contractual language can demonstrate a party's intent to waive its statutory right to bargain.

The Union responds with a series of inapposite arguments and case citations. It repeatedly claims, for example, that the Board violated the Court's remand order by failing to explain here the rationale it applied in *Hacienda I*—even though the Board did not rely on that rationale here. The Union's claim ignores how the Board complied with the Court's remand instructions, which clearly permitted it to "adopt a new rule." The Union, by persistently urging the Court to nonetheless address the merits of the Board's *Hacienda I* rationale, even though the Board did not rely on it here, ignores how the Court is barred from so doing by statutory limits on its jurisdiction.

Even where the Union addresses the issues that are before the Court, it gets them wrong. Thus, it errs in claiming that precedent that has "always" rejected the

idea that durational language in a contract can support a waiver claim. Contrary to the Union, the Board's waiver finding here—which is based on the fact that the parties agreed to specific durational limits in the dues-checkoff clauses themselves—is not precluded by factually distinguishable cases in which the Board found that a party did not waive its right to maintain the terms of a contractual provision upon expiration of the agreement. Simply put, those cases are inapposite.

Further, the Union misses the mark in claiming that the Board's decision here violated the employees' individual dues-checkoff authorizations and Section 302(c)(4) of the Labor Management Relations Act ("the LMRA"). Section 302 and those individual authorizations have no bearing whatsoever on the Section 8(a)(5) complaint allegation here. Equally misguided is the Union's suggestion that the Court should reject the Board's finding of waiver because it assertedly "offends voluntary unionism" and "discriminates against prounion assignments." These claims are not only erroneous, but based on the misconception that this case concerns individual authorizations, rather than the duty to bargain collectively.

Finally, the Union errs in asking this Court to remand this case "with instructions to enforce the Act." The Union premises its request on its erroneous view that the Board did not comply with this Court's remand order. Further, none of the cases cited by the Union support its untoward suggestion that this Court

should disregard settled rules for reviewing agency rulings, and "enforce the Act" based on grounds not considered or adopted by the Board below.

ARGUMENT

ON REMAND, THE BOARD PROPERLY DISMISSED THE COMPLAINT BASED ON ITS REASONABLE FINDING THAT THE UNION WAIVED ITS RIGHT TO BARGAIN OVER DUES DEDUCTIONS AFTER THE AGREEMENTS EXPIRED

The Board finding at issue here is very narrow. On remand, the Board dismissed the complaint against the Companies, but it expressly did not "rely on the rule articulated in [*Hacienda I*]." (ER 2.) Instead, it relied solely on "the particular circumstances of this case, in which the dues-checkoff clauses in the parties' [CBAs] contained explicit language limiting the [Companies'] dues-checkoff obligation to the duration of the agreements." (ER 1-2; 58-59, 68-69.) Accordingly, the issue before the Court is equally narrow: did the Board reasonably find that, in agreeing to this language, the Union waived its right to continue dues checkoff after the Agreements expired? As we now explain, the Board's fact-specific finding is reasonable, and this Court should therefore deny the Union's petition for review.

A. A Union May Waive Its Statutory Right To Prevent Unilateral Changes to an Otherwise Mandatory Subject of Bargaining Upon Expiration of an Agreement

Sections 8(a)(5) and 8(d) of the Act (29 U.S.C. § 158(a)(5) and (d)) make it an unfair labor practice for an employer "to refuse to bargain collectively with the

representatives of its employees " with respect to "wages, hours, and other terms and conditions of employment."[4] Section 8(a)(5) therefore bars employers from unilaterally changing terms and conditions, including dues check-off clauses, that involve mandatory bargaining subjects, unless the parties have bargained in good faith to impasse. *NLRB v. Katz*, 369 U.S. 736, 737 (1962). Moreover, this bar on unilateral changes applies to the terms and conditions of an expired contract. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

There is, however, "no doubt that a union may waive its statutory protection against unilateral changes in mandatory subjects of bargaining." *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001). *Accord American Distr. Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983); *see generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983). Although a waiver of statutory rights must be "clear and unmistakable," *Metropolitan Edison Co.*, 460 U.S. at 708, that standard "cannot be applied woodenly" because "whether rights have been waived . . . depends crucially upon context and the specific circumstances of each case." *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1031 (D.C. Cir 1986) (internal quotes and citations omitted); *accord American Distr. Co.*, 715 F.2d at 450. Accordingly,

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[4] Moreover, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7" of the Act (29 U.S.C. § 157). A Section 8(a)(5) violation results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

there are "no prescribed formulas" for determining whether specific terms survive the expiration of a CBA. *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 n.7 (citing *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993) (en banc)), *review denied sub nom. Des Moines Mailers Union Local 358 v. NLRB*, 381 F.3d 767 (8th Cir. 2004).

Moreover, in determining whether contractual terms constitute explicit waiver, the Board may be guided by the axiom that a contact should not be interpreted in a manner that renders any of its terms superfluous. *See* Rest. 2d Contr. § 203(a) (it is assumed in the first instance that no part of a contract is "superfluous"); *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 278-279 (9th Cir. 1992) ("It is well settled that a contract should be interpreted so as to give meaning to each of its provisions") (citing Rest. 2d Contr. § 203(a)); *Conoco Inc. v. NLRB*, 91 F.3d 1523, 1526 (D.C. Cir. 1996) (the parties "ought not to be presumed to have included in their agreement a meaningless provision") (citation omitted).

"Congress has made a conscious decision" in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board "the primary responsibility of marking out the scope . . . of the statutory duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Accordingly, the Board's determination as to whether or not the parties had a statutory duty to bargain must be affirmed if it "is reasonably

defensible." *Id.* at 497. The factual findings underlying the Board's determination are conclusive if supported by substantial evidence on the record. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 478 (1951). Although the Board's interpretation of a contract is reviewed *de novo, see Litton Financial,* 501 U.S. at 203, the courts are "mindful of the Board's considerable experience in interpreting collective-bargaining agreements." *Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 343 (4th Cir. 1995); *accord American Distr. Co.*, 715 F.2d at 450.

B. The Undisputed Contractual Language Here Supports the Board's Waiver Finding

The Board reasonably found here (ER 2) that the parties intended that the Companies' obligation to check off dues would expire with the Agreements and, thus, the Union waived any statutory right to dues check-off upon the Agreements' expiration. This finding is amply supported by the Agreements' terms, which expressly tied the Companies' dues-checkoff obligation to the duration of the Agreements not just once, but twice. (ER 1-2; 58-59, 68-69.) Thus, as the Board explained, "[n]ot only does the dues-checkoff [clause in each Agreement] state that it 'shall be continued in effect *for the term of this Agreement,*' but also Exhibit 2, incorporated by reference in the checkoff provision, explicitly states that the [Companies] agree to deduct monthly dues '*during the term of the agreement.*'" (ER 2; 58-59, 68-69) (emphasis added).

Contrary to the Union (Br 36), the Board analyzed this case under *NLRB v. Katz*, 360 U.S. 736 (1962), and reasonably found (ER 2) that, in agreeing to this specific durational language, the Union intended to waive any statutory right to continued dues check-off after the Agreements expired. Moreover, the Board reasonably explained (*id.*) how the specific durational language contained in the dues-checkoff clauses themselves, as opposed to general durational language elsewhere in the agreement, distinguishes these provisions from other contract terms subject to the unilateral change doctrine under *Katz*, and underscores the parties' intent that dues checkoff would expire with the Agreements.

The Board's narrow, fact-specific approach accords with precedent, which recognizes the distinction the Board made here between specific and general durational language. In *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001), for example, the Court, affirming the Board, rejected an argument for waiver based "solely" on a general durational clause, which provided that the CBA "shall remain in effect until [the expiration date]." *Id.* at 128-29, 132-33. The Court held that this "standard contract duration clause without more, cannot defeat the unilateral change doctrine." *Id.* at 132-33. Accordingly, while the Court refused to find waiver based "solely" on general durational language, it left open the possibility of finding waiver based on more specific contractual language. *Id.* Consistent with that distinction, the Board found waiver here based not on a

general durational clause, but on language in the dues-checkoff clauses themselves that expressly linked dues checkoff to the duration of the Agreements.

The Board's finding is also supported by the axiom that a contract should not be interpreted in manner that renders any of its terms superfluous. *See* cases cited above at p. 12. Accordingly, the Board reasonably disagreed with the view (ER 2 & n.7) that the parties' decision here to include specific durational limits in the dues-checkoff clauses themselves "adds nothing" to general durational language found elsewhere in an agreement.

Finally, the Board's fact-specific approach accords with the settled principle that waiver should not be determined by a rigid formula, but by the specific circumstances of each case. *See* cases cited above at pp. 11-12. Indeed, the Board's finding is consistent with precedent finding waiver where the contractual language provided that a particular obligation would "terminate" upon the expiration of the CBA. *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), *enforcement granted in part and denied in part*, 691 F.2d 1023 (D.C. Cir. 1982). While the language here may not be identical to that in *Cauthorne*, the parties' intent is nonetheless similarly clear. And, as the Board noted, there are no "prescribed formulas" for determining when contractual obligations survive expiration. (ER 2) (quoting cases.) In sum, the Board reasonably found that, by agreeing to dues-checkoff clauses that expressly limited themselves to the duration

of the Agreements, the parties intended that dues checkoff would not survive expiration of the Agreements. (ER 1-2.)

C. The Union's Arguments Are Without Merit

1. The Board complied with the Court's remand order

The Union's claim (Br 23-28) that the Board failed to comply with this Court's instructions on remand is a non-starter. It concedes (Br 8, 25) that those instructions provided that the Board could either "articulate a reasoned explanation for the rule it adopted [in its initial decision], *or* adopt a different rule and present a reasoned explanation to support it." *LJEB*, 309 F.3d at 586 (emphasis added). The Union does not dispute (Br 9, 25-26) that, pursuant to those instructions providing that it may "adopt a different rule," the Board declined in *Hacienda II* to rely on the rule it articulated in *Hacienda I*, and instead dismissed the complaint based on "the particular circumstances of this case." (ER 1-2.) As the foregoing shows, the Board in *Hacienda II* fully complied with the Court's instructions by "adopt[ing] a different rule"—that is, it provided a new, fact-specific rationale for dismissing the complaint.

The Union parts company with the plain meaning of those instructions when it urges (Br 25-26) that the *Hacienda II* Board had to pass on the *Hacienda I* rule, even after it explicitly declined to rely on it, and even after it adopted a different rule in disposing of the case. In effect, the Union takes the Court's instructions, which told the Board to either explain the *Hacienda I* rule "or" adopt a new one, and rewrites

them to effectively say "only adopt a new rule after having fully explained the old one." In other words, the Union simply misreads "do A *or* B" as "do A *and* B."

The Union's other claims fight the statutory limits on the Court's jurisdiction. It claims (Br 23), for example, that the Court should address the *Hacienda I* rule because it assertedly remains the Board's "national rule" even after the Board explicitly declined to rely on it in *Hacienda II*. By statute, however, this Court lacks jurisdiction to reach beyond the findings actually made in the final Board order before the Court. *See* Section 10(f) of the Act (29 U.S.C. § 160(f)); *Harrison Steel Castings Co. v. NLRB*, 923 F.2d 542, 545-46 (9th Cir. 1991) (Section 10(f) limits judicial review to final Board orders; reviewing court does "not have jurisdiction to review the Board's decision not to make [a finding]"); *accord American Distr. Co. v. NLRB*, 715 F.2d 446, 452-53 (9th Cir. 1983) (limiting judicial review to findings actually made in final Board order). Yet, the final Board order on review here—*Hacienda II*—does not adopt or apply the *Hacienda I* rule. Likewise, the Court does not have jurisdiction over a "national rule" that may have been announced or applied in other cases. Rather, it may only address those final Board orders that it has jurisdiction to review, within its statutorily-prescribed geographic limits. *See* 29 U.S.C. § 160(e) and (f).

Nor is there any merit to the Union's speculation (Br 24) that the Court should reach out for an issue not properly before it because this case "may be the

last opportunity for any court to review" the *Hacienda I* rule. The Union bases this claim on the alleged refusal of the Board's General Counsel to issue complaints that conflict with the *Hacienda I* rule. The Union's complaint seems to be that, as a result, there may never be a final, reviewable Board order addressing that rule. Of course, by statute, reviewing courts lack jurisdiction in these circumstances, because they are statutorily barred from reviewing Board actions that fall short of final Board orders. *See, e.g., Harrison Steel Castings Co.*, 923 F.2d at 545-46 (Section 10(f) of the Act limits judicial review to final Board orders). In any event, the Act also specifically bars the courts from reviewing the General Counsel's decision not to issue a complaint.[5]

2. The Union overstates the scope of the Board's waiver finding here to manufacture a false conflict with precedent

The Union claims (Br 28) that the Board's decision on remand is an "ad hoc departure" from unilateral change and waiver law, which it views (Br 29) as having "always rejected" the argument that "durational language in a CBA permits unilateral change after expiration." Right out of the gate, however, the Union

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[5] *See NLRB v. UFCW Local 23*, 484 U.S. 112, 118, 119 (1987); *NLRB v. Int'l Longshoremen's Union Local 50*, 457 F.2d 572, 578 (9th Cir. 1972) (pursuant to Section 3(d) of the Act (29 U.S.C. § 153(d)), the General Counsel has unreviewable discretion over the issuance and prosecution of unfair labor practice complaints).

misstates the scope of both the Board's decision and precedent in order to manufacture a false conflict between the two.

Contrary to the Union's suggestion (Br 29), the Board did not broadly hold that any "durational language" permits post-expiration unilateral changes. Rather, it limited its holding to the specific, undisputed facts here, where the dues-checkoff provisions in the parties' Agreements themselves contained clear language linking dues checkoff to the duration of the Agreements, as opposed to general durational language elsewhere in the Agreements. The Union cannot therefore rely (Br 29-36) on cases rejecting an argument for waiver based on different theories and circumstances. We explain this distinction below at pp. 20-24.

The Union likewise errs in suggesting (Br 29) that this same precedent requires the Board or this Court to "always" reject the argument that "durational language in a CBA permits unilateral change after expiration," or to apply the "clear and unmistakable" test for waiver as if it were a rigid, "prescribed formula." (Br 41). To the contrary, as the courts have explained, that test "cannot be applied woodenly" because "whether rights have been waived . . . depends crucially upon context and the specific circumstances of each case." *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1031 (D.C. Cir 1986). Consistent with the case-specific approach sanctioned by the courts, the Board reasonably, and narrowly, found that the specific contractual language in the dues-checkoff clauses here permitted unilateral

changes after expiration. For these reasons, the Union (Br 29-36) errs in relying on the distinguishable cases discussed below (pp. 20-24).

a. The benefit-fund cases cited by the Union are factually distinguishable

The Union (Br 29-34) errs in relying on a series of benefit-fund cases that are inapposite because they either involve general durational language found elsewhere in an agreement, or circumstances and theories different than those presented here. As we now show, the Board's waiver finding here, which is based on the specific durational limits in the dues-checkoff clauses themselves, is not precluded by those cases.

For example, the Union relies heavily (Br 29-30) on *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001), a case involving whether severance funds survived contract expiration. As noted (pp. 14-15), however, *Honeywell* actually supports the Board's finding here. Thus, while the Court refused to find waiver of the statutory right to bargain based "solely" on a "standard contract duration clause," it left open the possibility of finding such waiver based on more specific contractual language. *Id.* at 128, 132-33. Consistent with that distinction, the Board found waiver here based not on a general durational clause, but on language in the dues-checkoff clauses themselves that expressly linked dues checkoff to the duration of the Agreements.

Likewise, in *Schmidt-Tiago Constr. Co.*, 286 NLRB 342, 343 n.7, 365-66 (1987), on which the Union (Br 33) also mistakenly relies, the Board rejected an argument for waiver based on language that was neither explicitly durational in nature nor contained in the CBA itself. Specifically, the Board addressed a declaration of trust that defined fund payments as those made "in accordance with a Pension Agreement that is not detrimental to the Plan." *Id.* The Board found that this language was too ambiguous to support a finding of waiver because it was primarily drafted to comply with the requirements in Section 302(c)(5) of the LMRA, including that fund payments be used for the sole benefit of employees, as opposed to "the idea of circumscribing the Union's statutory right to bargain" under Section 8(a)(5) of the Act. *Id.* at 366 & n.39. There is no such ambiguity here, in contrast, where the dues-checkoff clauses themselves are clearly drafted to limit dues checkoff to the Agreements' duration.

The Union's reliance (Br 33) on *KBMS, Inc.*, 278 NLRB 826, 849-50 (1986), is likewise misplaced. There, the Board found no waiver where a declaration of trust provided that the employer shall make fund contributions "as long as [it] is obligated" to do so by its agreements with the union. The Board found that this language was too "ambiguous" to constitute an explicit waiver because the same trust article explicitly provided that it was not intended to alter the applicable CBAs. *Id.* at 850. There is no such ambiguity here, where the

Agreements' dues-checkoff clauses clearly limit themselves to the duration of the Agreements.

Nor can the Union rely (Br 34) on *CBC Indus., Inc.*, 311 NLRB 123, 125-28 (1993). There, the pension-fund plan provided that the employer's obligation to make fund payments "shall terminate" once the employer is "no longer obligated by a [CBA] to make contributions." The administrative law judge issued a recommended decision that primarily focused on a different issue: whether the parties bargained to impasse before the employer made unilateral changes. The judge also found that this contractual language was too ambiguous to constitute an explicit waiver given correspondence between the Funds and the employer doubting whether employer contributions would terminate with the CBA. *Id.* at 128. In the instant case, in contrast, the Union does not point to any extrinsic evidence that would vitiate the plain meaning of the specific durational limits in the dues-checkoff clauses. At any rate, nothing in the Board's decision in *CBC*, which adopted the judge's findings without comment, even comes close to supporting the broad rule urged by the Union (Br 29) to the effect that the Board should "always reject" waiver claims based on contractual durational language.

b. This Court's decisions in *Unbelievable* and *American Distribution* did not address, much less "condemn," the Board's reasoning here

The Union errs in asserting (Br 34-36) that the Board and this Court "condemned" the Board's waiver finding here as "sanctionably frivolous" in these two cases. To the contrary, these cases plainly addressed different facts and theories than those presented here.

In *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1440 (9th Cir. 1995), this Court addressed only the theory of "waiver of the right to bargain by union inaction." The Board relied on no such theory here, however. And, further exposing the Union's misplaced reliance on *Unbelievable*, the Court in that case awarded sanctions based on frivolous claims of bargaining impasse and other claims not presented here. *See id.* at 1438-41.

Nor does *American Distribution Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983), help the Union here. Although the Court agreed with the Board's determination to reject an employer's claim that a union had waived its right to bargain over pension contributions after the parties' CBA expired, the Court did so based on circumstances not present here. The employer had argued that three factors showed waiver,[6] but the Court, deferring to the Board's expertise, agreed

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[6] Specifically, the employer claimed wavier based on these factors: a pension certification was amended to state that it would expire with the CBA; the employer

that they did not. As none of those factors are present here, the Court's finding has no bearing on the instant case. Indeed, if anything, the cited case simply illustrates the point we make above (pp. 18-24) that determining whether a party has waived a bargaining right turns on the specific facts and circumstances of each case. And here, unlike *American Distribution*, the Union agreed to contractual terms explicitly limiting dues checkoff to the duration of the CBAs.

c. The Court is jurisdictionally barred from addressing the Union's untimely and meritless claim that the Board's findings here conflict with its findings in *Tribune Broadcasting*

On review, the Union (Br 38-39) argues for the first time that the Board's decision here conflicts with the decision it issued the day before in *Tribune Broadcasting Co.*, 351 NLRB No. 22 (2007). Section 10(e) of the Act (29 U.S.C. § 160(e)), however, bars this Court from considering this untimely claim. Under Section 10(e), "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here.

The Union never "urged" its claim before the Board, despite having the opportunity to file a motion for reconsideration with the Board. Its failure to do so is particularly inexcusable, given Chairman Battista's concurring opinion, which

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had exercised a contractual provision requiring pension trust approval before stopping contributions; and the union had failed to demand bargaining after the CBA expired. *Id.* at 450.

noted the recently issued decision in *Tribune*. (*See* ER 4 & n.3.) Yet, rather than inform the Board of its views on *Tribune*, the Union opted instead to bring its complaint directly to a reviewing court. It did so within two weeks of the issuance of the Board's order here, thereby giving the Board no opportunity to correct any alleged conflict with *Tribune*. Accordingly, this Court lacks jurisdiction to consider the Union's untimely claim. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (holding that, in the absence of a motion for reconsideration, Section 10(e) bars a court from considering arguments that the party has raised for the first time on appeal); *accord W&M Properties of Connecticut, Inc. v. NLRB*, 541 F.3d 1341, 1345-46 (D.C. Cir. 2008); *NLRB v. Friendly Cab Co., Inc.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008).[7]

In any event, there is no merit to the Union's claim that *Tribune* conflicts with the instant decision. *Tribune* did not address, let alone reject, the Board's reasoning here. Instead, *Tribune* turned on very different facts: the employer had first ceased dues deductions after the CBA expired, and later agreed with the Union to allow employees to use its direct-deposit system for the payment of dues.

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[7] Nor is the Union's failure excused merely because a Board member mentioned the *Tribune* decision in his concurring opinion in the instant case. Rather, "a petitioner must seek Board reconsideration or rehearing before it brings an issue to the courts, *even when the Board has discussed and decided the contested issue.*" *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007) (emphasis added) (citing *Woelke & Romero*, 456 U.S. at 665-66).

See Tribune, 351 NLRB No. 22, slip op. at 2-3. Thus, as the Board explained there, the parties had agreed to a "new status quo" after the CBA expired. *Id.* at 3. Accordingly, *Tribune* did not address the issue presented here—whether the Union, by agreeing to specific durational language in the dues-checkoff clauses of its expired CBAs, intended to waive its right to have dues checkoff continue after the CBAs expired. The Union therefore errs in arguing that these two decisions are in conflict.

3. Contrary to the Union, Section 302 of the LMRA and the employees' individual wage assignments have no bearing on the issues before the Court

Next, the Union misses the mark when it claims (Br 18, 42-50) that the Board's decision here violates Section 302(c)(4) of the LMRA (29 U.S.C. § 186(c)(4)), which requires that employees have the opportunity to decide whether to revoke their decisions to authorize dues deductions.[8] As we now show, Section 302 and the employees' individual authorizations have no bearing on the issues before the Court.

The Union errs in its heavy reliance (Br 42-50) on Section 302, which is irrelevant to the issues raised in this case. Unlike Section 8(a)(5) of the Act, Section 302 of the LMRA does not address an employer's duty to bargain with a

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[8] The Union also claims (Br 42) that the Board's "original" rationale in *Hacienda I* conflicts with Section 302(c)(4). As discussed above (pp. 16-18), however, that rationale is not before the Court because the Board did not rely on it here.

union. Rather, it is an anti-bribery provision that criminalizes direct payment of funds to unions by employers. *See* 29 U.S.C. § 186 (quoted by the Union at Br 3-4); R. Gorman, Labor Law: Unionization and Collective Bargaining 951-52 (2004) ("Gorman"). Section 302(c)(4) provides an exception for the deduction of dues from the wages of employees who have given written consent, provided that consent is revocable after a year, or, if sooner, the expiration of the applicable CBA. *See* Gorman at 952. Section 302(c)(4), however, has no bearing on the Section 8(a)(5) complaint allegation here. Indeed, Congress did not intend that anything in Section 302 would in any way alter the Board's criteria for determining violations of Section 8(a)(5). *See* Gorman at 952-53 (explaining that Congress intended that Section 302 would "leave undisturbed" the Board's "preexisting criteria" for determining unfair labor practices, and, thus, a violation of Section 302 is "completely independent" of those criteria) (citations omitted). Accordingly, Section 302(c)(4) does not in any way support the Union's claim (Br 42-47) that the employees' individual authorizations redefine the Companies' Section 8(a)(5) duty to bargain here.

For this reason, the Union errs in relying (Br 43-47) on Section 302(c)(4) cases that do not address the issue presented here, namely, whether unilaterally ceasing dues checkoff after the expiration of a CBA violates Section 8(a)(5). Those cases address a completely different issue—whether employers or unions

unlawfully coerce employees, in violation of Section 8(a)(1) or 8(b)(1)(A) of the Act,[9] by refusing to honor employees' attempts to exercise their Section 302(c)(4) right to revoke their dues-checkoff authorizations. *See, e.g., Peninsula Shipbuilders Assoc. v. NLRB*, 663 F.2d 488, 489, 492-93 (4th Cir. 1981) (discussing whether employer violated Section 8(a)(1) by refusing to honor employees' dues check-off revocations).[10] The instant complaint makes no such allegation, however. In short, the cases cited by the Union are inapposite because they do not involve Section 8(a)(5) of the Act.

In particular, nothing in the Supreme Court's decision in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959), upon which the Union heavily and mistakenly

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[9] As noted, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7" of the Act (29 U.S.C. § 157). In addition, some of the Union's cases involve Section 8(b)(1)(A) (29 U.S.C. § 158(b)(1)(A)), which makes it an unfair labor practice for a *union* to restrain or coerce employees in the exercise of those rights.

[10] The Union's other cases address similar allegations and are therefore inapposite. *See, e.g., UFCW Local 1 v. NLRB*, 975 F.2d 40, 43-44 (2d Cir. 1992) (union unlawfully refused to honor employees' attempts to partially revoke their dues-checkoff authorizations); *NLRB v. USPS*, 827 F.2d 548, 553 (9th Cir. 1987) (under the Postal Act's analog to Section 302, employer unlawfully refused to honor employee's revocation after employee resigned union membership); *NLRB v. Albert Van Luit & Co.*, 597 F.2d 681, 683-85 (9th Cir. 1979) (employer unlawfully solicited specific employees to revoke their dues authorizations); *Lockheed Space Operations Co., Inc.*, 302 NLRB 322, 324 (1991) (union unlawfully had dues deducted from paychecks of employees who had resigned from union).

relies (Br 44-45), shows that the Board erred in dismissing the Section 8(a)(5) refusal-to-bargain complaint here. Rather, in *Felter*, an employee submitted his dues-checkoff revocation on the proper form, but the employer rejected it because it had not been furnished by the Union and forwarded by the Union to the employer as mandated by the CBA. *Id.* at 327. The Court held that the CBA could not override or add to the procedures for revocation prescribed in the Railway Labor Act's equivalent of Section 302. *Id.* at 334. The Union cannot, however, leap from that narrow premise to its view (Br 18-19, 43 & n.7) that the employees' individual authorizations here "supersede any limitations in a [CBA]," even where, as here, the CBA does not conflict with the revocation procedures provided in Section 302(c)(4).

For all of these reasons, the Union errs in suggesting (Br 19, 48, 55, 57) that the *Hacienda II* Board somehow held, contrary to Section 302(c)(4), that the Companies had the right to cancel the employees' wage authorizations "against their will." This claim ignores the limited nature of the issue before the Court. Nothing in the Board's decision precludes employees from choosing to pay union dues. Indeed, the complaint did not even allege that the Companies cancelled, or attempted to cancel, any employee's authorization against her will. Rather, the complaint alleged that the Companies violated their duty to bargain with the Union pursuant to Section 8(a)(5) of the Act. Thus, consistent with settled Section 8(a)(5)

precedent, the Board properly determined the merits of that allegation by examining the expired CBAs' terms. *See* cases cited above at pp. 11, 14-15 (determining Section 8(a)(5) allegations based on whether the CBAs permitted unilateral changes).

4. The Union errs in assuming that the common law of private contracts controls the Section 8(a)(5) complaint here

The Union also misses the mark entirely in arguing (Br 47) that "a dues checkoff authorization is a contract between an employee and the employer," and that (Br 50-52) the common law of private contracts governs such authorizations.[11] The common law of private contracts has no bearing on the Section 8(a)(5) complaint allegation here. Rather, it is settled that the legal principles relevant here—the unilateral change doctrine under Section 8(a)(5) and *Katz*—apply to the terms and conditions of a CBA that involve mandatory subjects of bargaining. *See* cases cited above at pp. 11, 14-15. Thus, even if the Companies breached the employees' common law assignments (and there is no such allegation here), a common law breach of a private contract would not be a violation of Section 8(a)(5).

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[11] In this section of its brief, the Union claims (Br 50) that the Board's decision in *Hacienda I* violates the common law of private contracts. As discussed above (pp. 16-18), however, the Board's *Hacienda I* rationale is not before the Court because the Board did not rely on it here.

5. The Union's meritless claims that the Board's decision dishonors voluntary unionism and discriminates against prounion assignments have nothing to do with this case

The Union also misses the mark in claiming (Br 19, 52-55) that the Board's decision here should not be enforced because it "offends voluntary unionism" and "disqualifies wage assignments only if they are prounion." These claims are not only erroneous, but based on the misconception that this case concerns individual wage assignments, rather than the duty to bargain collectively. *See* pp. 26-30, above. Moreover, far from "dishonoring voluntary unionism" (Union Br 52) or "undermining collective worker action" (Union Br 54-55), as the Union claims, the Board's decision honors the bargain struck between the Companies and the employees' collective-bargaining representative, the Union, which agreed to terms limiting dues checkoffs to the duration of the CBAs.

Nor can the Union rely (Br 53) on plainly inapposite cases to accuse the Board of only protecting assignments in favor of entities other than a union. In *King Radio Corp.*, 166 NLRB 649, 653 (1967), for example, the Board held that an employer unlawfully cancelled payroll deductions for savings bonds right after a majority of employees voted for a union, in obvious reprisal for that vote. The Union errs (Br 53) in relying on that cases because it does not even remotely involve a situation like the one presented here, where a union bargained away its right to receive dues checkoffs after the CBAs expired. At any rate, the Union also

ignores how *King Radio* protects the employees' rights to support their union. And, the fact that the Board, in the cases cited by the Union (Br 53), found unlawful unilateral changes does not mean that the Board would not also reach a similar result on those facts if the assignee were a union.

Finally, the Union is wide of the mark in claiming (Br 57) that this case is "controlled" by *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986). There, the Supreme Court addressed a completely different issue, holding that the Board could not demand that nonunion employees be permitted to vote on a union's decision whether to affiliate with another union. *Id.* at 204-09. That issue has no bearing on the Section 8(a)(5) refusal-to-bargain complaint here. Moreover, in erroneously relying on that case, the Union does no more than repeat (Br 57) its false assumption that the Board's decision here allows the Companies "to cancel union members' wage assignments" against their will. As discussed above (p. 29), the Board's decision here does no such thing.

D. The Union Errs in Asking the Court To Remand this Case "With Instructions To Enforce the Act"

Finally, the Union errs in claiming (Br 57-60) that the Board's "refusal" to explain the *Hacienda I* rationale in the instant case justifies a remand "with instructions to enforce the Act." Simply put, the Board did not need to explain the *Hacienda I* rationale in the instant case because the Board did not rely on it here. Rather, as fully discussed above (pp. 16-18), the Board complied with the Court's

instruction that it may "adopt a different rule" by declining to rely on the rule in *Hacienda I*, and instead adopting a new, fact-specific rationale.[12] Accordingly, the Union (Br 60) cannot analogize this case, where the Board complied with the Court's order by adopting a new rationale, to one where the agency engaged in "government intransigence" by doing the opposite of what the court told it to do,[13] or "abused its administrative discretion" by relying "on the same rationale it [had previously] disavowed before this court."[14]

Nor is the Union helped (Br 58) by citing a case holding that a 6-year delay did *not* justify rejecting the Board's order. *See NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1299 (9th Cir. 1991). Nothing in *Hanna* supports the Union's suggestion that this Court should disregard settled rules of appellate review and administrative procedure and *sua sponte* "enforce the Act" on grounds not considered or adopted by the Board below. Rather, *Hanna* recognizes that a

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[12] Thus, the Union plainly errs in asserting (Br 59) that the Board is "standing pat" on the *Hacienda I* rationale. Nor is the Union correct to assume (Br 59) that this Court "must" address the *Hacienda I* rationale even after the Board declined to rely on it here. Rather, as explained above (pp. 17-18), the Court does not have roving jurisdiction to rule on a rationale even though the Board did not rely on it in the final order on appeal.

[13] *Earth Island Institute v. Hogarth*, 494 F.3d 757, 769-770 (9th Cir. 2007) (agency continued to rely on political considerations even after court "admonished" it not to do so).

[14] *Arizona Elec. Pwr. Coop., Inc. v. U.S.*, 816 F.2d 1366, 1373 (9th Cir. 1987).

reviewing court is not required to reject the Board's holding based on delay. *See id.* (noting that, despite the delay, "fewer policies are frustrated" by affirming the Board's order than by rejecting it).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION LOCAL 226, AND BARTENDERS UNION LOCAL 165,	)	
Petitioner,	)	No. 07-73979
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent,	)	Board Case No. 28-CA-13274
ARCHON CORP., Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,118 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 9th day of April, 2008

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Respondent,	)	Board Case No. 28-CA-13274
and	)	
ARCHON CORP.,	)	
Intervenor	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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